STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 236363 Wayne Circuit Court
GREG STEWART, a/k/a WILLIE DUDLEY, Defendant-Appellant.	LC No. 00-006578

Before: Cooper, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84.[1] Defendant was sentenced to two to ten years in prison. We affirm.

I. Competence to Stand Trial

Defendant first argues that the trial court abused its discretion in finding defendant competent to stand trial. We disagree.

The determination of a defendant's competence is within the trial court's discretion, and will only be reversed where there is an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MCL 330.2020(1) sets forth the standard for determining whether a criminal defendant is incompetent to stand trial:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall

[1] Defendant was charged with assault with intent to commit murder, MCL 750.83.

> determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in preparation of his defense and during his trial. [*People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000); *Harris*, *supra* at 102.]

At defendant's competency hearing, the parties stipulated that the trial court could make a determination of competency based on the report of Donald M. Aytch, Ph.D.[2] Aytch's report stated, in relevant part:

> (1) The defendant is capable of understanding the nature and object of the proceedings.
>
> (2) The defendant is aware of his position as defendant in the pending proceedings.
>
> (3) The defendant is capable of assisting in his defense in a rational and reasonable manner.

Based on the report, the trial court found defendant competent to stand trial. Defendant did not present additional evidence at the hearing, and defense counsel did not object to Aytch's report.

Defendant now argues that the facts in Aytch's report do not support the conclusion that defendant was competent to stand trial. We disagree. Aytch found that defendant had no overt indication of thought disorder, attention deficits, memory dysfunctions, or physical limitations. Defendant's intelligence was measured at low average with an ability to read and write. Defendant exhibited mild deficits in social and academic skills. Thus, although Aytch found that defendant had poor hygiene, below normal speech quality, and a depressed mood, these attributes, in light of the other facts, do not show that defendant is incapable of understanding the nature and object of the proceedings against him or that he is incapable of assisting his defense in a rational manner. Defendant also argues that Aytch's report did not mention the medical records from defendant's admission at Aurora Hospital. However, a review of these records reveals that they are consistent with and do not invalidate Aytch's conclusion. Therefore, we find the trial court did not abuse its discretion in finding defendant competent to stand trial based on Aytch's report.

II. Prosecutorial Misconduct

Defendant next argues that he was denied a fair trial as a result of the prosecutor's improper conduct. We disagree.

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[2] MCL 330.2030(3) provides in relevant part:

> The written report shall be admissible as competent evidence in the hearing unless the defense or prosecution objects, but not for any other purpose in the pending criminal proceeding. The defense, prosecution, and the court on its own may present additional evidence relevant to the issues to be determined at the hearing.

Generally, a claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Appellate review of allegedly improper prosecutorial conduct is precluded if the defendant fails to timely and specifically object. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). The issue of defendant's aliases was raised before and addressed by the trial court. However, defendant failed to specifically object to the baseball bat comments, the blood splatter comment, and to the prosecutor calling defendant a liar. This Court will only review the unpreserved claims for plain error. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte*, *supra* at 721. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the defense theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

After reviewing the evidence, we find that the prosecutor did not err in arguing that defendant used the aluminum baseball bat to strike the victim. The victim testified that he was struck after defendant left the apartment and returned. The victim also testified that he kept an aluminum baseball bat by his front door. As a result of the blows, the victim sustained a broken jaw, collapsed lungs, and injuries to his eye. Based on this evidence, it was not improper for the prosecutor to argue that the baseball bat could have caused the victim's injuries.

Defendant also argues the prosecutor improperly rendered an expert opinion as to what constitutes blood splatter. In closing argument, the prosecutor stated:

> If you are helping your uncle, if you are helping any person that's bleeding profusely you don't get blood splatters all over your hat, you get drips or smudges or something like that. You only get blood splatters when you're hitting the head and the blood is flying back and hitting the hat you're wearing.

Defendant argues that the prosecutor was not qualified to provide an expert opinion as to what constitutes a blood splatter. However, the prosecutor never claimed to be an expert, and was not giving an expert opinion. The prosecutor properly argued the evidence and reasonable inferences therefrom as they related to the defense theory of the case. *Bahoda*, *supra* at 282.

Defendant argues that the prosecutor improperly referred to him as a liar. The prosecutor stated, "He's going to turn on them and he's going to call them liars when he's the admitted liar." A prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The evidence demonstrated that defendant lied to the police on May 15, 2000 about his name and lied stating that he never told his mother to call 9-1-1. Therefore, the prosecutor's argument that defendant was not worthy of belief was proper.

Finally, defendant argues that the prosecution improperly questioned defendant in front of the jury about his aliases. This Court has held that it is appropriate for the prosecution, on

cross-examination, to question a defendant about aliases used at the time of the arrest. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Where the evidence is relevant to the witness' credibility under MRE 608 and MRE 609, such questions are proper. *Id*. Because defendant's use of an alias at the time of his arrest was relevant with regard to his credibility, the prosecutor's questions and comments in this regard were proper.

III. Lesser Included Offense Jury Instruction

Defendant next argues that he was not given notice of the lesser included offense jury instruction. We find that defendant waived this issue. Defense counsel stated on the record that defendant had not requested the lesser included instruction, but the prosecution had. Defense counsel then expressed satisfaction with the verdict form. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). One who waives his rights under a rule may not seek appellate review of a claimed deprivation of those rights, for waiver has extinguished any error. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

IV. Defendant's Presence at Trial

Defendant next argues that he was denied due process when defense counsel waived his presence in court the morning the jury rendered its verdict. We disagree.

Generally, to preserve an issue for appellate review, it must be raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant did not raise the issue of his absence at trial in the lower court. Therefore, it is not preserved. To avoid forfeiture of a constitutional nonstructural error, the defendant must demonstrate that the error was plain and affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The Confrontation Clause, U.S. Const, Am VI; Const 1963, art 1, § 20 guarantees a criminal defendant the right to be present at all stages of his trial and to a face-to-face meeting with the witnesses against him." *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). Nonetheless, these rights are not absolute and must be construed according to the necessities of the trial and the adversarial process. *Id*. The test for determining whether a defendant's absence from a part of a trial requires reversal of his conviction is whether it is possible that defendant's absence made a difference in the result. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977); *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

On the day defendant was absent from trial, the jury requested trial exhibits. However, defendant was present when the parties agreed which exhibits to enter. Defendant was also present when the parties agreed to give the exhibits to the jury if requested. Nothing in the record reflects that evidence was received outside of defendant's presence. See *People v Harris*, 133 Mich App 646, 652; 350 NW2d 305 (1984). Based our review of the record, defendant's brief absence from court when the jury requested exhibits and rendered its verdict did not have an effect on the outcome of the trial. Therefore, there was no plain error affecting defendant's substantial rights.

V. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a request for new trial or an evidentiary hearing, our review is limited to the record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that defense counsel was ineffective for waiving the appearance of defendant on the morning the jury rendered the verdict. As discussed above, defendant was not prejudiced by this absence. Therefore, defense counsel was not ineffective in this regard.

Defendant also argues that defense counsel should have rehabilitated him after the prosecutor questioned him regarding his calling the victim a "mother f-----." We find both that the record lacks factual support for defendant's argument that rehabilitation was either possible or advisable in this situation. Moreover, the decision was a matter of trial strategy left to trial counsel. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also argues that defense counsel was ineffective for stipulating to defendant's competence to stand trial. Defense counsel did not stipulate to defendant's competence to stand trial. Rather, defense counsel stipulated that the trial court could rely solely on Aytch's report in ruling on defendant's competence to stand trial. Defendant also contends defense counsel should have requested an independent evaluation. However, defendant has failed to present other evidence that could have been used to show that he was incompetent to stand trial. Defendant only refers to the Aurora Hospital medical records that, as discussed above, do not support defendant's argument that Aytch's report was inaccurate Therefore, defendant has failed to show a reasonable probability that the result of the proceeding would have been different had an independent evaluation been performed.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly